92-1023

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS E. MORTON, JR.,
Petitioner

v.

SOUTHERN UNION COMPANY,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 14, 1992

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QUESTIONS PRESENTED

1. Where the district court has subject matter jurisdiction due to a pendent claim, must courts of appeal review *de novo* district courts' determinations of state law?

2. On the breach of contract claim that resulted in a jury verdict for Morton, did the appeals court violate this Court's requirement of *de novo* review of state law determinations when (a) it failed to state that its decision is based on *de novo* review of Texas law with no deference to the district court sitting in Texas, (b) it prefaced the central legal doctrine with: "As we understand Texas law . . .," (c) there is no decision of the Supreme Court of Texas directly in point, and (d) it issued a non-published decision reserved for "opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law . . .?"

3. In the circumstances outlined in Question 2, did the appeals court violate Rule 34(a), F.R.A.P., by refusing to permit oral argument?

4. On Morton's breach of contract and fraud claims, did the court of appeals improperly invade the province of the jury by failing to view the evidence in the light most favorable to Morton and to give Morton the benefit of all inferences which the evidence fairly supported?

LIST OF PARTIES AND RULE 29.1 LIST

The parties before the court of appeals and this Court are listed in the caption. Southern Union Company's parent company is Metro Mobil CTS, Inc.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

Thomas E. Morton, Jr. prays for a writ of certiorari to review the Opinion and Order of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on July 31, 1992.

OPINIONS BELOW

The opinion of the court of appeals is unpublished. It is attached hereto (Petitioner's Appendix ("Pet.App.") at 1a). The Order of the Fifth Circuit denying Morton's Petition for Rehearing, issued September 14, 1992, is unreported and attached hereto. Pet. App. at 8a. The

district court's Opinion granting Judgment Notwithstanding Verdict on Morton's breach of contract claim is attached hereto (Pet. App. at 9a); the district court's directed verdict in the trial transcript is attached hereto. Pet. App. at 19a.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by writ of certiorari after rendition of judgment. The decision for which review is sought was entered July 31, 1992. Pet. App. at 1a. Pursuant to this Court's Rule 13.1, the time for filing a petition for certiorari runs from the date of the denial of a petition for rehearing. The petition for rehearing was timely filed, and rehearing was denied on September 14, 1992. Pet. App. at 8a.

STATEMENT OF THE CASE

A. The May 18, 1988 Letter

Southern Union hired Tom Morton as its General Counsel and Vice President in 1981. In April, 1987, Frank W. Denius, Chairman, President, and Chief Executive Officer of Southern Union announced that Morton had been elected to the additional office of Executive Vice President and continued as General Counsel and Corporate Secretary of Southern Union. Denius recommended Morton for this promotion to the position of second highest corporate officer.

In the spring of 1988, Morton and Denius discussed changes that would be made when Southern Union relocated its corporate headquarters from Dallas to Austin, Texas. Pet. App. at 25a. Morton and Denius met several times about the proposed reorganization. *Id.* Denius, Morton, and Ron Endres discussed the table of organization; at Denius' request, Morton had prepared the letter agreement Endres received when he relocated to Austin in 1986 to become President of Southern Union's

Gas Utility Division. *Id.* Denius told Morton, "I want to make sure that you get the same deal that Ron got as far as benefits so why don't you get that letter and draft up something for me to look at." *Id.* Denius told Morton what the leter should contain; Denius told Morton he recommended to the Board of Directors that Morton would be President and Chief Operating Officer and that he (Denius) would continue as Chairman and Chief Executive Officer. *Id.* As Denius gave Morton this information, he told Morton he had made this recommendation to the Board in executive session. Denius told Morton that the Board had accepted his recommendation. Pet. App. at 28a. Morton believed his boss. *Id.*

The May 18, 1988 letter flowed from several lunch meeting where Morton and Denius had talked about the table of organization. Denius said he did not want to continue as CEO forever but that for the time being, that was a role he thought it would be best for him to occupy, and that Morton would be President and Chief Operating Officer; Denius explained that Mr. Endres would be Executive Vice President in charge of the Utility Operation and that he did not feel Endres, based on his training and experience, had the credentials to be CEO of a New York Stock Exchange listed company, that Endres did not have Morton's breadth of experience. Pet. App. at 28a.

Morton physically handed Denius the letter he had requested in Denius' office and stood next to and watched while Denius read and signed the letter. Pet. App. at 26a-27a. Morton testified that Denius, an attorney himself, "had always been very careful about what he signed and was very meticulous and prided himself in that regard." Pet. App. at 27a. The full May 18, 1988 letter, signed by Denius and Morton, is in Appendix E. Pet. App. at 22a-23a. In it Denius states in part:

> It is my pleasure to inform you that the Board of Directors has accepted my recommendation that you

> be named the President and Chief Operating Officer of Southern Union Company. As you know, your acceptance of this promotion will require a physical relocation for you to Austin, Texas area. In the meantime, substantial travel must be involved at an inconvenience to you but for the benefit of the Company.
>
> You, of course, are entitled tc all benefits under the Company's moving and relocation policy #113 subject to the following modifications:
>
> . . .
>
> With respect to the purchase of a new residence in the Austin, Texas area, the payment of points (up to three (3) points) on financing for the purchase shall be made by the Company.
>
> If the foregoing properly sets forth our understanding, please sign and return to me a duplicate copy of this letter which will serve as a memorandum of our mutual agreement.

Morton first discovered that Denius claimed he never recommended Morton as President to the Southern Union Board of Directors at Denius' deposition, after Morton filed suit. Pet. App. at 28a. Denius admitted he signed the May 18, 1988 letter (Pet. App. at 41a) but claimed that he did not read it before he signed it. *Id.* Denius has practiced law since May, 1949. Denius learned in law school to "think like a lawyer," took "Contracts," and covered the "four corners doctrine" under which a contract's meaning depends on what it says within its four corners. Pet. App. at 40a-41a. Denius testified: "Yes, sir, you're not supposed to isolate sections. You are supposed to read it in its entirety." Pet. App. at 41a. Denius admitted that he covered the concept of "offer" and "acceptance." *Id.*

Morton never received the promised promotion to President. *Id.* Although the letter states: "It is my pleasure to inform you that the Board of Directors has accepted my recommendation that you be named the President and Chief Operating Officer of Southern Union Company,"

Denius testified the Board never voted on Morton becoming President and Chief Operating Officer of Southern Union. Pet. App. at 43a. Denius summed up: "The Board never did vote on it, and I never did recommend it to them." *Id.*

Morton would not have known that Denius failed to do what he told Morton orally and in writing he had done—that he had recommended and the Board had accepted his recommendation that Morton "be named the President and Chief Operating Officer of Southern Union Company." Morton testified the Board sometimes takes action that does not go in the minutes and does not require a formal resolution; that the Board could decide to do something in the future and not put it in the minutes; and that in many personnel matters, executive changes were not announced until after they actually took effect. Pet. App. at 36a-39a.

B. Events Following the May 18, 1988 Letter, Including Morton's Termination

After Denius signed the May 18 letter, he gave no clue that Morton should not rely on it. Two days after Denius signed the May 18, 1988 letter, on May 20, 1988, Denius and Morton signed an amendment to Morton's Severance Compensation Agreement, extending it until April 3, 1992. Pet. App. at 35a-36a. Morton then made several trips to Austin. Pet. App. at 31a. Because of the promise in the letter, he continued working for Southern Union, foregoing the opportunity to look for work elsewhere. Pet. App. at 31a-32a. As the second in command at Southern Union and its General Counsel, Morton was marketable before he was terminated. *Id.* Morton had acquired his house in Dallas in March, 1985 for $260,000. In October, 1988, Morton entered into a contract to sell his Dallas residence. Ownership was transferred on October 26, 1988 to a relocation company, with a sale price of $175,000. Pet. App. at 34a. Morton lost $56,000 on the house. *Id.* Morton testified he sold his house relying upon the

May 18, 1988 letter and the promise of being President of Southern Union. Pet. App. at 29a, 34a.

In the meantime, Southern Union moved ahead with its plan to relocate corporate offices to Austin. Denius signed a letter dated September 30, 1988 as Chairman, President, and Chief Executive Officer, addressed to Southern Union's landlord in Dallas, giving notice that "Southern Union intends to move its Dallas office operations to Austin, Travis County, Texas in the next few months." Pet. App. 32a. Denius enclosed a check to satisfy the lease termination provisions in the amount of $654,186.38. *Id.*

On February 17, 1989, Morton submitted a letter to Denius enclosing a copy of the May 18, 1988 letter and requesting an opportunity to discuss it and related matters. Pet. App. E. On February 20, 1989, Denius replied by memo, making no disavowal of having read or signed the promotion letter, and stating that Morton was "completely aware of the delays and the reasons therefor" in connection with the corporate move to Austin. Pet. App. at 24a.

By letter of March 28, 1989, Frank Denius advised Morton that if he did not resign before the close of business on March 29, 1989, he would be terminated. Morton turned down the resignation/severance compensation offer that was contingent upon execution of a release since he deemed it to be "basically unfair." Pet. App. at 30a. The separation package offered in Denius' March 28 letter provided for, *inter alia*, "reimbursement for loss on sale of Dallas residence." Pet. App. at 30a. Southern Union terminated Morton on March 29, 1989. Pet. App. at 29a.

C. The Trial

Jury trial commenced on April 1, 1991. Southern Union did not contend it had cause to fire Morton and did not request a "just cause" jury instruction or ques-

tion. At the conclusion of evidence, the trial court granted Southern's Motion for Directed Verdict on Morton's fraud claim on grounds that there was no reliance (the rationale accepted by the court of appeals) or damages.[1] The district court submitted three claims by Morton to the jury, including breach of contract as to the promotion letter signed by Denius and Morton, dated May 18, 1988 (R. 1085-1099).

The jury unanimously found in Morton's favor on breach of contract, that the May 18, 1988 letter constituted a written employment contract, that Southern Union's termination of Morton breached that contract, and that $1,850,000 would compensate Morton for Southern Union's breach of the May 18, 1988 contract if paid now in cash. Pet. App. at 47a-48a. The district court granted Southern Union's motion for judgment notwithstanding the verdict. Pet. App. at 9a. Despite having submitted fact questions to the jury on whether the May 18, 1988 letter constituted a contract and whether the termination was a breach of such a contract (Pet. App. at 47a), the district court viewed the contract claim as one with undisputed facts (Pet. App. at 13a) and ruled that Southern Union was entitled to judgment as a matter of law because under the Texas employment-at-will doctrine, an employer may breach a written agreement to promote with impunity unless the employee and the employer had a contract specifically denying the employer the right to terminate employment at will or setting forth a specific tenure of employment. Pet. App. at 16a-17a.

D. Decision on Appeal

In addressing Morton's breach of contract claim, the Fifth Circuit Court of Appeals treated the facts as undisputed. Pet. App. at 3a-6a. The appeals court did not

[1] The district court's ruling on Morton's fraud claim is set forth in full at Pet. App. D, 19a-20a.

acknowledge its duty under *Salve Regina College v. Russell*, —— U.S. ——, 111 S.Ct. 1217 (1991), that a court of appeals must review the state law determinations of district courts *de novo* and that no form of appellate deference is acceptable. The court of appeals did not mention the decision of the Texas Supreme Court in *Hanks v. GAB Business Services, Inc.*, 644 S.W.2d 707 (Tex. 1983), that "a party who elects to treat a contract as continuing deprives himself of any excuse for ceasing performance on his own part." Nor did it acknowledge expressly that there was no decision of the Supreme Court of Texas directly in point. It prefaced the central legal doctrine under Texas law, a proposition that "[A]n employer's [written] promise merely to promote an at-will employee at an unspecified future date does not create [an express limitation on the employer's right to terminate employment at will] with the comment: "As we understand Texas law." Pet. App. at 5a. The court of appeals refused to permit oral argument and issued a non-published decision reserved for "opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law . . . ." Pet. App. at 1a.

On Morton's fraud claim, the court of appeals did not mention the standard of review for directed verdicts, and held the district court was entitled to conclude the essential element of reliance was missing. Pet. App. at 6a-7a. The court of appeals did not acknowledge or discuss Morton's evidence supporting a finding of reliance, but instead stated: "Southern Union's evidence was that there was no Board approval and that Denius signed the letter without seeing the error there."

REASONS FOR GRANTING THE PETITION

There are special and important reasons for granting Morton's Petition for a Writ of Certiorari. This Court, the Federal Rules of Civil Procedure, and the Federal Rules of Appellate Procedure articulate rules of deference concerning jury findings, *de novo* non-deference for review of decisions of state law, and the safeguard of oral argument in cases of this kind. The Fifth Circuit's decision is in conflict with the Eighth Circuit's decision that *de novo* review is required for circuit court review of pendent claims and so far departs from the accepted and usual course of judicial proceedings and sanctions such a departure by the trial court, as to call for an exercise of this Court's power of supervision.

Last year this Court resolved a conflict between the circuits in its landmark ruling that courts of appeals must conduct *de novo* review of district courts' determinations of state law where subject-matter jurisdiction in the district court is based on diversity of citizenship and that in such instances, no form of appellate deference is acceptable. *Salve Regina College v. Russell*, —— U.S. ——, 111 S.Ct. 1217 (1991). In this case, where federal subject matter jurisdiction was based upon a pendent claim, the Fifth Circuit disregarded a jury verdict, denied oral argument, failed to conduct *de novo* review and deferred to the district court determination of state law.

In a single stroke, the Fifth Circuit has created (1) a new conflict between the circuits—on the issue of whether courts of appeal must review *de novo* district courts' determinations of state law where subject matter jurisdiction is conferred by a pendent claim and (2) a need for this Court to exercise its power of supervision to insure that the deference that was wide-spread before the *Salve Regina College* decision does not reemerge. This potential is real where the Fifth Circuit has failed to mention the standard of review, where its decision indicates that *de novo* review has not been conducted,

and where at least one other circuit has already misstated this Court's ruling in *Salve Regina* that "no form of appellate deference is acceptable," as a holding that an appellate court "need not defer to district court rulings on questions involving interpretations of state law." *Hand v. Matchett*, 597 F.2d 971, 974 (10th Cir. 1992).

In addition, on both Morton's breach of contract and fraud claims (disposed of by the district court by J.N.O.V. and directed verdict respectively), the Fifth Circuit violated fundamental principles of deference—deference of the court to jury findings. Rule 50(a)(1), F.R.C.P., and this Court, *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404 (1962), require district courts and the courts of appeals to view the evidence in the light most favorable to Morton and to give him the benefit of all inferences which the evidence reasonably supported. The district court and the Fifth ciruit deprived the jury of its proper role and Morton of the standard of review to which he is entitled.

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE EIGHTH AND FIFTH CIRCUITS ABOUT WHETHER *SALVE REGINA COLLEGE* APPLIES TO REVIEW OF COURTS OF APPEALS OF ALL DISTRICT COURT DETERMINATIONS OF STATE LAW ISSUES REGARDLESS OF WHETHER THEY ARISE IN DIVERSITY OR AS PENDENT CLAIMS.

This Court should grant review for essentially the same reasons and to finish the task it began when it granted review in *Salve Regina College v. Russell*, —— U.S. ——, 111 S.Ct. 1217 (1991). Insuring *de novo* review as opposed to some form of deference for determinations of state law is equally important whether the district court has jurisdiction because of diversity or a pendent claim. *See generally*, Coenen, To Defer or Not to Defer: A Study of Federal Court Deference to District Court

Rulings on State Law, 73 Minn. L. Rev. 899 (1989). The Court's *Salve Regina College* decision did not expressly decide the standard of review where the district court has jurisdiction due to a pendent claim.

The Eighth Circuit has expressly concluded that *Salve Regina College* applies to appellate review of all district court determinations of state law issues, whether they arise in diversity or as pendent claims. *Paramount Pictures v. Metro Program Network*, 962 F.2d 775, 778, n. 6 (8th Cir. 1992).

The Fifth Circuit has expressly applied *Salve Regina College* in cases where the district court had subject-matter jurisdiction based on diversity of citizenship. *See, e.g., City of Arlington v. Federal Deposit Ins. Corp.*, 963 F.2d 79, 80-81 (5th Cir. 1992); *General Electric Capital Corp. v. Southeastern Healthcare, Inc.*, 950 F.2d 944, 948 (5th Cir. 1991); *City Public Service Board v. General Electric Co.*, 935 F.2d 78, 80 (5th Cir. 1991); *Allison v. ITE Imperial Corp.*, 928 F.2d 137, 138-40 (5th Cir. 1991). In this case, where federal court subject matter jurisdiction was based on a pendent claim, not on diversity, the Fifth Circuit conducted "traditional" judicial review, deferring to the reasoning of the district court (Pet. App. at 4a-6a), failing to expressly discuss the holding the Supreme Court of Texas would reach if presented with this issue, and making no statement that his review as *de novo* with no deference to the district court's determination of state law.

There is a split in the circuits. Logic dictates that the reason the Fifth Circuit did not state that it was conducting de novo review pursuant to *Salve Regina College* is because it was not conducting de novo review. Where Morton's briefs, and indeed his Supplemental Statement Regarding Oral Argument (Pet. App. 51a), urged de novo review, logic dictates further that the Fifth Circuit chose against de novo review on purpose and because *Salve Regina College* was a diversity case and does not ex-

pressly forbid the Fifth Circuit's deference rule in this pendent jurisdiction case. As to any notion that the Fifth Circuit actually conducted de novo review in this pendent jurisdiction case, it is important to adhere to the reasoning expressed in *Salve Regina College*, *supra*, 111 S.Ct. at 1223. The Court rejected the argument "that the Courts of Appeals that claim to accord special consideration to the District Court's state-law expertise actually undertake plenary review of a determination of state law." *Id.* The Court "decline[d] the invitation to assume that courts of appeals craft their opinions disingenuously." *Id.* The same is true here—the Fifth Circuit did not actually undertake plenary review without saying so.

The Fifth Circuit stated no justification for its failure to apply *Salve Regina College* to the review of state law determinations of pendent claims. On the other hand, the reasoning of the Eighth Circuit on this question is persuasive:

> We conclude that *Salve Regina College*, 111 S.Ct 1217, applies to our review of all district court determinations of state law issues, whether they arise in diversity or as pendant claims. This is consistent with both the language and the holding of *Salve Regina College*, which are broad. It is also consistent with the logic used by the Court. The Court stressed that both the function and structure of the appellate courts are designed to allow more thoughtful consideration of questions of law. *Id.* at 1221. Deferential review, the Court points out, invites divergent development of state law among federal trial courts, even within the same state, creating a dual system of enforcement of state-created rights in which the substantive rule applied may depend on the choice of forum. *Id.* at 1222. We see so reason to distinguish between diversity jurisdiction and pendant jurisdiction. Such a distinction would only create a dual system of enforcement where the substantive rule applied may depend, not only the choice of forum, but on the jurisdictional basis on which the claim is before the court.

Paramount Pictures v. Metro Program Network, Inc., 962 F.2d 775, 778, n. 6 (8th Cir. 1992). A review of decisions of courts of appeals applying *Salve Regina Colleges de novo* review standard demonstrates that where the standard is articulated and applied, this Court's goal of accomplishing more thoughtful consideration of questions of law has been realized.[2]

II. THE IMPORTANCE OF *DE NOVO* REVIEW OF STATE LAW DETERMINATIONS WARRANTS AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION TO INSURE THAT COURTS OF APPEALS GRANT *DE NOVO* REVIEW WITH NO FORM OF JUDICIAL DEFERENCE.

The fundamental importance of the *de novo* review, with no form of judicial deference, and the importance of appellate court adherence to this standard announced in *Salve Regina College*, justify Court review where an appeals court is silent about the standard of review employed and where all signs indicate it employed some form of deference. It does not look like the Fifth Circuit conducted *de novo* review; if it did so, no one can tell.

We respectfully suggest that *Salve Regina College* was not written to permit the courts of appeals to conduct lesser forms of review of determinations of state law through the vehicle of silence—failing to state the

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[2] *See, e.g., MidAmerica Federal Savings & Loan Ass'n v. Shearson/American Express, Inc.*, 962 F.2d 1570, 1472 (10th Cir. 1992); *Liberty Mutual Ins. Co. v. Triangle Industries, Inc.*, 957 F.2d 1153, 1156 (4th Cir. 1992); *Oneida Tribe of Indians v. State of Wisconsin*, 951 F.2d 757, 760 (7th Cir. 1991); *General Electric Capital Corp. v. Southeastern Healthcare, Inc.*, 950 F.2d 944, 948 (5th Cir. 1991); *High v. Balun*, 943 F.2d 323, 325 (3d Cir. 1991); *Prince v. Rescorp Realty*, 940 F.2d 1104, 1107 (7th Cir. 1991) (Seventh Circuit comments: "The district court was not faced with an easy task"); *Blankenbaker v. McCook Public Power District*, 940 F.2d 384, 385 (8th Cir. 1991); *Cumberland & Ohio Co. of Texas, Inc. v. First American Nat'l Bank*, 936 F.2d 846, 848 (6th Cir. 1991); *Garnac Grain Co., Inc. v. Blackley, et al.*, 932 F.2d 1563, 1569 (8th Cir. 1991).

standard employed so the parties can debate and wonder whether there was plenary *de novo* review or some form of deference. Indeed, shortly after it issued the *Salve Regina College* decision, this Court reversed the Eighth Circuit's unpublished decision affirming the Western District of Arkansas, because this was not the *de novo* review required now by this Court. *Parker Solvents Co., Inc. v. Royal Ins. Cos. of America*, 938 F.2d 185 (8th Cir. 1991, —— U.S. ——, 112 S.Ct. 40 (1991).

Before *Salve Regina College*, a majority of the courts of appeals, using a variety of phraseology, deferred (to one degree or another) to a district court's interpretation of the law of the forum state. *Salve Regina College*, 111 S.Ct. at 1220-21. Describing this pre-*Salve Regina College* situation, the Eighth Circuit stated:

> In previous cases such as this, we have deferred to the state law ruling of a federal court sitting in the state whose law controls, unless the ruling is fundamentally deficient in analysis, without a reasonable basis, or contrary to recorded state court opinion.

Ballard v. Northwestern National Life Ins. Co., 931 F.2d 513, 516 (8th Cir. 1991). The Fifth Circuit, in a post-*Salve Regina College* diversity decision, described the previous Fifth Circuit law as follows:

> *Salve Regina College* recently overruled our prior rule, by which we "customarily defer[red] to the district judge in a diversity case involving interpretation of the law of the state in which that judge sits. [citing authority]. Of course, we were " 'not bound by the district court's interpretation and [could] reverse the court if we believe[d] the court ha[d] incorrectly applied the state's law.' " [citing authority].

Parker Plaza West Partners v. Unum Pension and Ins. Co., 941 F.2d 349, 352, n. 5 (1991) (emphasis added).

The Fifth Circuit's *Morton* decision reveals a danger that with varying phraseology, the courts of appeals will revert to deference of one forum or another. The Tenth Circuit has already quoted *Salve Regina College*

for the proposition that "appellate courts need not defer to district court rulings on questions involving the interpretation of state law." *Hand v. Matchett, et al.*, 957 F.2d 791, 794 (10th Cir. 1992). The notion that the district court "need not" defer is directly contrary to this court's holding: "When *de novo* review is compelled, no form of appellate deference is acceptable." *Salve Regina College, supra*, 111 S.Ct. at 1224.

The Tenth Circuit's misstatement of this Court's *Salve Regina College* holding is a variant of the now-overruled (at least in diversity cases) rule that the court of appeals was not bound by the district court's interpretation and could reverse if it believed the district court had improperly applied the state's law. *Parker Plaza West Partners v. Unum Pension & Ins. Co.*, 942 F.2d 349, 352, n. 5 (5th Cir. 1991), *citing Dean v. Dean*, 821 F.2d 279, 283, n. 4 (5th Cir. 1987).

The Fifth Circuit's technique in *Morton* constitutes a greater threat to the standard of appellate review required by *Salve Regina College*. On its face, the Fifth Circuit failed to acknowledge *Salve Regina College*, failed to expressly conduct *de novo* review, and made no statement that it did not defer to the district court's determination of Texas law. The Fifth Circuit red flagged its failure to conduct *de novo*, plenary review by refusing oral argument [3] and issuing an unpublished decision un-

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[3] Rule 34(a), F.R.A.P., insures that Oral Argument will be allowed unless:

> (1) the appeal is frivolous; or (2) the dispositive issue or set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

The Fifth Circuit departed from the dictates of Rule 34(a), F.R.A.P. under these circumstances. The Fifth Circuit did not suggest Morton's appeal from j.n.o.v. and directed verdict rulings was frivolous, nor that "the dispositive issue or set of issues has been recently authoritatively decided. . . ." The facts and legal

der Fifth Circuit Local Rule 47.5 that pertains to opinions that "have no precedential value and merely decide particular cases on the basis of well-settled principles of law. . . ." Pet. App. at 1a.

A careful reading of the Fifth Circuit decision indicates plainly that the Fifth Circuit conducted "traditional" review, deferring to the district court determination absent proof by appellant Morton that the district court determination was expressly contrary to a published Texas case. The Fifth Circuit analysis did not find that the Supreme Court of Texas has ever held that an employer may renege with impunity on a written promise to promote, particularly where the employee has performed his part of the agreement. Morton had cited recent, well-reasoned rulings of the Supreme Courts of South Dakota and Virginia, and *Larson v. Kreiser's, Inc.*, 427 N.W.2d 833 (S.D. 1988), and *Sea-Land Service, Inc. v. O'Neal*, 297 S.E.2d 647 (Va. 1982).

The Fifth Circuit, however, made no determination of Texas law. It attempted to distinguish *Larson* (Pet. App. 4a-5a) and *Sea-Land* (Pet. App. 6a), and noted that no Texas case adopts *Larson*. Since no Texas case has ever rejected *Larson* or held that at will employment *is* an excuse to renege on a written agreement, the fact that no Texas case adopts *Larson* obviously is not dispositive

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arguments in this case are important and complex, as noted in two separate requests for oral argument by Morton to the Fifth Circuit. Pet. App. J and K. Oral argument may have significantly aided the decisional process to the extent that the Fifth Circuit would expressly acknowledge the requirement—or at least the issue—of *de novo* review of state law determinations. Oral argument may have contributed to a decision that deals with Morton's evidence and not just Southern Union's of a non-at-will contract and reliance as to Morton's fraud claim. Particularly where *Salve Regina College* requires careful consideration of questions of state law by the courts of appeals, a court of appeals violates Rule 34(a), F.R.A.P. when there is no directly in point decision of the state supreme court and it refuses to permit oral argument.

in a *de novo* review.[4] Deference analysis seeks an in point Texas Supreme Court decision contrary to the district court's determination of Texas law. The Opinion contained a disclaimer—its "understanding" of Texas law —a far different undertaking from plenary de novo review of Texas law:

> As we understand Texas law, an employer's promise merely to promote an at-will employee at an unspecified future date does not create [a limitation on the employer's right to terminate employment at will].

The doctrine of supposed Texas law was not followed with a single citation. Pet. App. at 5a. The Opinion did not state its "understanding" of whether Texas law permits an employee to sue for damages when an agreement to promote has been broken.

Employment rights are sufficiently critical to warrant federal and state legislation prohibiting various species of discrimination. *See, e.g.*, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq.* Employment is how most people pay their bills. Strong policy reasons would preclude an employer from tricking job applicants or existing employees with written "agreements" whereby the employer obtains benefits and the employee receives an illusory promise. Texas law does not manifest the hostility to written contract rights attributed to it by the Fifth Circuit's unpublished opinion. The Texas Supreme Court has expressly limited the at will doctrine with its ruling in *Sabine Pilot Service v. Hauck*, 687 S.W.2d 788 (Tex. 1985), that despite this doctrine, an "at will" employee may recover damages when fired for refusing to do something subject to criminal penalties. A careful and plenary review of Texas law would not result in a prediction that the Texas Supreme

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[4] Where the supreme court of a state has not spoken on a point, the task of the court of appeals is to predict the state supreme court's ruling. *Salve Regina College, supra*, 111 S.Ct. at 1220, 1224.

Court would expand the at will doctrine to excuse employers that breach written agreements to promote.

A plenary review of Texas law would show that:

(a) Under Texas law whether an employee is at will is irrelevant to enforcement of a written promise to promote.

(b) Under Texas law an employer has no right to enter into a written agreement to promote an existing employee in exchange for (1) his continued service and (2) work by the employee that is agreed to be detrimental to the employee and for the benefit of the company and then (3) after the employee performs his part of the agreement and sells his residence in reliance upon the agreement to relocate, to refuse to promote and, instead, fire the employee with impunity because of the "employment at will" doctrine.

(c) Under Texas law a promise to promote an existing employee is not unenforceable on the theory that the employer would have been free to fire the employee at will so long as it timed the termination to follow the promotion.

The Fifth Circuit discussion does not mention a single Texas case involving a promise to promote. It omits reference to *C.F. Southern Region, Inc. v. Marshall*, 787 S.W.2d 471 (Tex. App.—Houston [14th Dist.] 1990, no writ) (breach of contract verdict upheld where as a condition of employment the employee was to be promoted to vice president of his department after six months upon review of his performance and was not promoted). *C.F. Southern Region* shows that in Texas a promise to promote its enforceable; whether employment itself is "at will" is irrelevant. The Fifth Circuit misstates *Roberts v. Geosource Drilling Service, Inc.*, 757 S.W.2d 48 (Tex. App.—Houston [1st Dist.] 1988, no writ). *Roberts* does *not* merely apply to a promissory estoppel claim. *Roberts expressly* held that the promise that triggered *Ri*berts' reliance was a basis for refusing summary judg-

ment against Roberts' claim for anticipatory breach of contract. *Id.*, 757 S.W.2d at 51.

The May 18, 1988 letter is a written promise to promote in an employment context, and the jury found Southern Union breached the agreement when it fired Morton (and thereby finally failed to promote him as agreed). Had the Fifth Circuit focused on the May 18 agreement, and the legal question of enforceability of a promise to promote, it would have analyzed Texas decisions in which promises have been broken and the "at will" issue never comes into play. In Texas, where an employer makes an offer, the offer is accepted, and the employee undertakes performance, there is an enforceable contract. Breach triggers an action for the damages. This straightforward approach has nothing whatever to do with whether employment is "at will." *See, e.g., Lone Star Steel Co. v. Scott*, 759 S.W.2d 144 (Tex. App.—Texarkana 1988, writ denied). The Fifth Circuit discussion of these important questions omitted any inquiry as to whether the "at will" doctrine comes into play with a unilateral contract where an offer has been accepted by an employee and performance has begun. *See Cole v. Control Data Corp.*, 947 F.2d 313, 318 (8th Cir. 1991) (employer cannot evade obligation to pay for software development it promised to purchase on grounds that employment is at will).

The Opinion begins with a bizarre comment that "Morton did not assert a claim against Southern Union for failing to promote him." Pet. App. at 4a. The failure to promote was part and parcel of the termination and Morton asserted it from beginning to end. The jury charge expressly set forth Morton's contentions "that the May 18, 1988 letter contractually bound Southern Union to *promote* Morton to the position of President and Chief Operating Officer of Southern Union and that by discharging Morton Southern Union breached that promise." Pet. App. at 45a-46a. (emphasis added). Further, the instructions to Plaintiff's Third Claim: "Breach of Con-

tract" specifically recited the promise to promote. Pet. App. at 46a. The trial court submitted the issue to the jury and Southern Union did not appeal its wording. It was correct to query whether the termination breached the promise to promote since the jury could (and did) conclude that termination was the ultimate breach of the promise to promote—no promotion now or ever.

The promise to promote *and* Morton's acts pursuant to the letter agreement deprived Southern Union of "any excuse" for ceasing performance on the promotion promise, including the excuse of "at will" employment. The Opinion fails to acknowledge the Texas Supreme Court decision in *Hanks v. GAB Business Services, Inc.*, 644 S.W.2d 707 (Tex. 1983), involving a covenant not to compete. The Texas Supreme Court held that the seller's breach of a covenant not to compete did not excuse the buyer's obligation to pay the final installment due for the business purchased where the buyer had retained the assets of the business and chosen to treat the contract as continuing:

> A party who elects to treat a contract as continuing deprives himself of any excuse for ceasing performance on his on part.

Id. at 708. Likewise, the Opinion fails to address *Sheline v. Dun & Bradstreet Corp.*, 948 F.2d 174 (5th Cir. 1991), where the Fifth Circuit upheld a ruling that a covenant not to compete (a species of employment agreement) that was unenforceable under Texas law because it contained no geographical area limitation rendered an entire employment severance agreement unenforceable and the covenant not to compete could not be reformed to impose a reasonable geographical area limitation. Sheline tried to enforce his former employer's promise to make severance payments but failed himself to comply with the covenant not to compete. The Fifth Circuit ruled:

> He frets that our decision might be understood to suggest that a promise to a covenant not to compete is

> excused *ab initio* from its obligations under the contract and *even if* the promisor abides (needlessly) by the covenant without knowledge that the covenant is unenforceable. Let us allay his fears.
>
> A promisee waives its right to rescind on a contract if it "elects to treat a contract as continuing." *Hanks*, 644 S.W.2d at 708. Thus, had Sheline abided by the terms of the severance agreement and refrained from competing, Dun & Bradstreet could not have refused to make the agreed upon severance payments on the ground that the covenant was unenforceable. Having treated the agreement as continuing and effective, Dun & Bradstreet would have been obliged to honor its part of the bargain.

Sheline, 948 F.2d at 179. Under *Hanks* and *Sheline* Southern Union was not excused from its promise to promote *ab initio*. The opinion suggests no rationale why the excuse of at will employment would count more to the Texas Supreme Court than the excuse of illegality rejected in *Hanks* and *Sheline*.

While *Hanks* should be dispositive, the recent, well-reasoned rulings of the Supreme Court of South Dakota and Virginia support Morton's argument. The Opinion makes a distinction without a significant difference that *Larson v. Kreiser's Inc.*, 427 N.W.2d 833 (S.D. 1988), involved an employer's promise to *hire* an employee for a particular position, while Morton was an existing employee. Pet. App. at 4a. The facts in *Morton* are much stronger: The promise to promote is in writing (not oral) and it specified travel to Morton's detriment and Southern Union's benefit. Pursuant to the agreement, Morton continued employment and sold his Dallas residence. There is no logical reason why the Texas Supreme Court would hold that a promise to hire a job applicant for a particular position should create non-at-will employment while a promise to promote an exising employee to a higher position, particularly where the existing employee changes his position pursuant to the agreement, would lack this result.

Moreover, the Virginia Supreme Court dealt with an *existing employee* in *Sea-Land Service, Inc. v. O'Neal*, 297 S.E.2d 647, 650 (Va. 1982). The employer promised O'Neal *while she was employed* that if she resigned her sales representative job, she would be given the teletype and messenger job. O'Neal did, and Sea-Land did not. The Virginia Supreme Court reasoned like the Texas Supreme Court in *Hanks*. The mere fact that Sea-Land *could have* terminated O'Neal at will, while she was still a sales representative or after it honored its promise to transfer O'Neal to the teletype-messenger job was irrelevant because it did not dimisss her this way.

> Instead, it promised her that, if she resigned from the one position, she would be employed in the other. This was an undertaking separate and apart from any contract covering the particular position involved and was not subject to any presumption of terminability at will that might have applied to such a contract. Once O'Neal performed her part of the bargain by resigning from the first position, Sea-Land became obligated to perform on its part and breached that obligation to her damage when it refused to employ her in the teletype operator/messenger position.

Id., 115 LRRM at 4245. Likewise, Southern Union fired Morton *before* keeping its promise to promote him to President.

Thus, the Opinion's speculation about Texas Law is unfounded under *Hanks*, *Larson*, and *Sea-Land*. The Opinion states:

> Moreover, the *Larson* rule confers little benefit on at-will employees in the absence of a specific limitation, because the employer could terminate the employee lawfully simply by waiting until shortly after the employee's promotion.

Pet. App. at 5a. In support of this proposition, the Fifth Circuit cites no Texas case, only lower court decisions from New York and Florida that conflict with the rationale of *Hanks* and *Larson* and the express holding of *Sea-Land*.

This is hardly the careful plenary review of Texas law, designed to accurately predict the holding the Texas Supreme Court would reach on this issue, envisioned and required by *Salve Regina College, supra*, 111 S.Ct. at 1221-22. Moreover, the Fifth Circuit did not avail itself of the certification option encouraged by this Court. *Salve Regina College, supra*, at 1224, n. 4. The Opinion in this case illustrates perhaps the ultimate wrong approach. In *American Waste and Pollution Control Co. v. Browning-Ferris, Inc.*, 949 F.2d 1384, 1395 (5th Cir. 1991), Judge Brown in dissent suggested, "When In Doubt, Certify" and stated:

> Floundering around, at best, in an effort to predict what the Supreme Court of Louisiana would do, we deny, not only to the parties but to the jurisprudence of Louiisana as well, the opportunity to obtain an authoritative answer to the problem facing this panel.

Id. at 1395. In *Morton*, the Fifth Circuit again declined the certification option. Worse still, it "punted" by disposing of the need to conduct plenary review of state court law to determine what the Supreme Court of Texas would decide on this issue with the disclaimer, "As we understand Texas law. . . ." Pet. App. at 5a. Where the Fifth Circuit does not expressly acknowledge its obligation to conduct *de novo* review and to avoid any form of judicial deference, this shallow form of judicial review results. It is important for this Court to exercise its supervisory powers to preclude the silent rejection of *de novo* review required by *Salve Regina College*.

III. IN AFFIRMING THE DISTRICT COURT'S JUDGMENT NOTWITHSTANDING THE VERDICT AS TO MORTON'S BREACH OF CONTRACT CLAIM AND DIRECTED VERDICT ON MORTON'S FRAUD CLAIM, THE COURT OF APPEALS FAILED TO INSURE THAT THE DISTRICT COURT DEFERS TO THE JURY WHEN IT COMES TO WEIGHING THE EVIDENCE AND THE INFERENCES TO BE DRAWN AND THE COURT OF APPEALS FAILED TO VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO MORTON.

Another reason for this Court to exercise its power of supervision is to insure that the Fifth Circuit requires deference when deference *is* required (while it should *not* defer to district courts' state law determinations). Specifically, on both the breach of contract and fraud claims, because these were disposed of by judgment notwithstanding the verdict and directed verdict respectively, the court of appeals was bound to view the evidence in the light most favorable to Morton and to give him the benefit of all inferences which the evidence fairly supported, "even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404 (1962). It is the jury's function to weigh the evidence and the inference to be drawn therefrom and to come to the ultimate conclusion as to the facts. *Id. Continental Ore Co., supra*, at 696-97 concluded:

> From our examination of the rather extensive record, we have concluded that the court of appeals departed from this rule and erred in holding that there was insufficient evidence to support a finding that respondents' conduct in fact caused injury to Continental's business.

The rule that the district court must, in effect, defer to the jury for fact finding (provided there is sufficient evidence) and that the courts of appeals must view the evidence in the light most favorable to a non-moving

party, is as fundamental to the accepted and usual course of judicial proceedings and to a litigant's appeal rights in the federal system as the rule articulated by this Court in *Salve Regina College, supra.* While a circuit court *must not* defer to the district court's determinations of state law, the district court and the circuit court *must* defer to the jury for findings of fact where there is sufficient evidence.

The court of appeals disregarded this rule (codified at 50(a)(1), F.R.C.P.) as to Morton's breach of contract and fraud appeals. On the breach of contract question, the Fifth Circuit acknowledged only a portion of the *Continental Ore Co.* rule:

> We review the district court's judgment notwithstanding the verdict to determine whether the record contains evidence that would cause reasonable jurors applying the proper legal standard to reach different conclusions. *Boeing Co. v. Shipman*, 411 F.2d 365-374 (5th Cir. 1969) (en banc).

Pet. App. at 5a. The Fifth Circuit then failed to address Morton's evidence that there was a contract and that the contract was breached. The Fifth Circuit apparently adopted the district court's reasoning that Morton's contract case turned on undisputed facts. Pet. App. at 13a. Morton produced evidence of negotiations and discussions about relocation to Austin and the May 18, 1988 letter itself which literally states that Morton's acceptance of the promotion would require him to physically relocate to Austin and engage in substantial travel at his inconvenience, but for Southern Union's benefit. The letter is in contract format, ending with the term "accepted and agreed." Morton also presented evidence that he had given up his opportunity to seek other employment while still employed as Southern Union's number two executive and General Counsel in a better employment market in order to remain employed by Southern Union to take advantage of the promotion promise Southern Union never fulfilled.

In Texas, whether there is a contract is generally a question of fact. *H.L. Scott v. Ingle Brothers Pacific, Inc.*, 489 S.W.2d 554 (Tex. 1972). The exception is "when undisputed documentary evidence shows that the parties intended to be bound and there is no legally sufficient evidence to the contrary. *Henry C. Beck Co. v. Arcrete, Inc.*, 515 S.W.2d 712, 716 (Tex. Civ. App.—Dallas 1974, writ dismissed). The district court submitted a jury question as to whether the May 18, 1988 letter constituted a contract. Pet. App. at 47a. In determining whether parties have formed a contract, an agreement may be implied from and evidenced by the parties' conduct in the light of the surrounding circumstances, including any earlier course of dealings. *Haws and Garrett General Contractor v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 609-10 (Tex. 1972).

As to Morton's fraud claim, the Fifth Circuit's one-paragraph discussion (Pet. App. at 6a-7a) did not cite any part of the *Continental Ore Co.* rule nor the Fifth Circuit rule that it must view the evidence in the light most favorable to the nonmoving party, give the benefit of all reasonable inferences, and leave the function of weighing evidence to the jury. In stark contrast, the Fifth Circuit stated it agreed with the district court after noting, "*Southern Union's* evidence was that there was no Board approval and that Denius signed the letter without seeing the error there." (emphasis added). With disregard to Morton's evidence that the letter and its contents were not errors at all and that he relied upon the promise to promote, the Fifth Circuit weighed evidence when it determined that (meticulous attorney) Denius was telling the truth when he claimed he signed the letter without seeing the "error"—a proposition the jury found incredible. The jury heard and saw Morton and Denius testify about the circumstances of the reading and signing of the May 18 letter. Pet. App. 25a-28a, 40a-44a. The jury believed Morton and disbelieved Denius, thus resolving a swearing match with substantial evidence.

There was ample evidence for a jury to conclude that Morton could rely upon a written promise from his employer. Although Morton drafted the letter, Denius told him what to include; Morton watched Denius read it before signing. Denius never claimed he failed to read the May 18 letter or had made a mistake in it, despite the fact that Morton brought it specifically to his attention well before the termination date. Pet. App. E and F. Indeed, the jury could reasonably infer that Denius had Morton fired to *escape* the promise to promote. Morton testified he knew it was the Board's practice in personnel matters not to announce executive changes until they actually took effect. A jury could well have concluded that Morton reasonably relied on the written agreement, in contract form, from Southern Union's Chairman of the Board, President, and Chief Executive Officer.

The Fifth Circuit conducted its review of the district court's directed verdict on Morton's fraud claim in the same (and therefore erroneous) manner in which it reviewed the district court's determination of Texas law on Morton's breach of contract claim. After setting forth the district court's reasoning and the evidence that was favorable to Southern Union cited by the district court, the Fifth Circuit stated, "We agree." Pet. App. at 7a. The district court, under these circumstances, *should* have deferred to the *jury* that had sufficient evidence that Morton relied upon the written promise from Denius; the court of appeals should have applied the standard of review required by this Court in *Continental Ore Co. v. Union Carbide and Carbon Co.*, 370 U.S. 690, 696-97 (1962), and the court of appeals should not have, in effect, deferred to the district court's reasoning when the district court weighed the evidence, decided credibility and thus applied the improper standard in granting a directed verdict.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 14, 1992

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 91-1685
Summary Calendar

THOMAS E. MORTON, JR.,
Plaintiff-Appellant,

versus

SOUTHERN UNION COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(CA 3 89 0939 H)

[Filed July 31, 1992]

Before REAVLEY, DAVIS and DEMOSS, Circuit Judges.

REAVLEY, Circuit Judge: *

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pur-

The district court directed a verdict against Thomas E. Morton, Jr., on his fraud claim and entered judgment notwithstanding the verdict in favor of Southern Union Company on Morton's contract claim, after deciding that Morton was an employee-at-will, thus precluding breach by discharge. We affirm.

I. BACKGROUND

Morton formerly worked for Southern Union as vice president and general counsel. Southern Union terminated Morton's employment, and Morton sued alleging fraud, breach of contract, and violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621-34 (ADEA). At the close of Morton's case, the district court directed a verdict against Morton on his fraud claim. The jury found for Southern Union on Morton's ADEA claim and one of his two contract claims, but found for Morton on his other contract claim and awarded him damages of $1,850,000. However, the trial court granted Southern Union's motion for judgment notwithstanding the verdict and entered a take-nothing judgment. The court found no evidence that Southern Union's promise to promote Morton, on which the jury relied in finding a breach of contract, altered Morton's status as an at-will employee.

II. DISCUSSION

Morton argues on appeal that Southern Union's promise to promote was inconsistent with at-will employment, and therefore the jury was entitled to find in his favor. Morton also contends that substantial evidence supports his fraud claim, and therefore the district court erred in directing a verdict on that claim.

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suant to that Rule, the Court has determined that this opinion should not be published.

A. THE CONTRACT CLAIM

Texas law presumes at-will employment under an employment contract when "the term of services is left to the discretion of either party, or the term left indefinite, or determinable by either party." *East Line & R.R.R. Co. v. Scott*, 10 S.W. 99, 102 (Tex. 1888); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W2d 733, 734 (Tex. 1985). In the case of an at-will employment relationship, "it is no breach of contract to refuse to receive further services." *Scott*, 10 S.W. at 102. Morton could overcome the presumption that Southern Union was free to terminate his employment at will be establishing either that "the tenure of employment is . . . conclusively shown by the contract," *Horn v. Builders Supply Co.*, 401 S.W.2d 143, 149 (Tex.Civ.App.—Tyler 1966, writ ref'd n.r.e.), or that the contract otherwise specifically limits Southern Union's right to terminate him. *Schroeder v. Texas Iron Works, Inc.*, 769 S.W.2d 625, 628 (Tex.App.—Corpus Christi 1989, no writ).

At trial, Morton grounded his successful contract claim on a May 18, 1988 letter to him from Frank W. Denius, then Southern Union's chairman, president, and chief executive officer, stating:

> It is my pleasure to inform you that the Board of Directors has accepted my recommendation that you be named the President and Chief Operating Officer of Southern Union Company. As you know, your acceptance of this promotion will require a physical relocation for you to the Austin, Texas area. In the meantime, substantial travel must be involved at an inconvenience to you but for the benefit of the Company.
>
> You, of course, are entitled to all benefits under the Company's moving and relocation policy #113 subject to the following modifications:
>
> . . . .

> If the foregoing properly sets forth our understanding, please sign and return to me a duplicate copy of this letter which will serve as a memorandum of our mutual agreement.

Denius signed the letter on behalf of Southern Union, and Morton also signed beneath the words "ACCEPTED AND AGREED." The jury found, in response to a special interrogatory, that this letter was an employment contract that Southern Union breached by firing Morton.

The district court rejected the jury's finding, reasoning that the letter "contains no reference to a specific term of employment, nor does it specifically provide that Southern Union did not have the right to terminate the employment contract at will." The court found no evidence of a specific agreement to defeat the presumption arguments that a promotion contract can be enforced of at-will employment. The court also rejected Morton's without regard to the at-will doctrine, and that Morton's reliance, evidenced, *inter alia*, by selling his Dallas residence to Southern Union's relaction company, renders the doctrine inapplicable. We agree with the district court.

Morton did not assert a claim against Southern Union for failing to promote him. He only argues that Southern Union's promise to promote changed his at-will status. Morton relies on *Larson v. Kreiser's, Inc.*, 427 N.W.2d 833 (S.D. 1988), but that case is not controlling. The *Larson* plaintiff complained of being dismissed after having decided to accept employment because of the employer's specific promise that the plaintiff would "someday become president of the company." *Id.* at 833. The employer was a family business whose president and chief executive officer was the plaintiff's father. Although the employer had made no other promise limiting its right to terminate the employment relationship at will, the court found the employer's promise sufficient to raise a triable issue. But the court explicitly limited its ruling

to cases "involv[ing] an employer's promise to hire an employee for a particular position." *Id.* at 834.[1]

We review the district court's judgment notwithstanding the verdict to determine whether the record contains evidence that would cause reasonable jurors applying the proper legal standard to reach different conclusions. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). We first note that no Texas case adopts *Larson*, or disavows the requirement that an employee in Morton's position must bring evidence of a specific, express limitation on the employer's right to terminate employment at will. As we understand Texas law, an employer's promise merely to promote an at-will employee at an unspecified future date does not create such a limitation. In any event, Southern Union did not persuade Morton to accept employment by promising to hire him for the specific position of president and chief operating officer. And, unlike the court in *Larson*, the district court heard all of the evidence before concluding that Southern Union could terminate Morton's employment at will. Moreover, the *Larson* rule confers little benefit on at-will employees in the absence of a specific limitation, because the employer could terminate the employee lawfully simply by waiting until shortly after the employee's promotion. *See Silver v. N.L. Indus., Inc.*, 118 L.R.R.M. (BNA) 2695 (S.D.N.Y. 1985) (employer concededly could have "promoted [plaintiff] . . . on a Tuesday, and discharged him . . . the following Thursday"); *Servamerica, Inc. v. Rolfe*, 318 So.2d 178, 180 (Fla.App. 1975) (had plaintiff been placed in specific position for which hired, defendant "could have immediately discharged him without liability").

Morton argues that his detrimental reliance on the May 18 letter by, *inter alia*, selling his residential prop-

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[1] Other courts have so limited *Larson*. *Merritt v. Edson Express, Inc.*, 437 N.W.2d 528, 529 (S.D. 1989); *Holloway v. Congre*, 896 F.2d 1131, 1134 (8th Cir. 1990).

erty, modified his at-will status. Morton relies on *Roberts v. Geosource Drilling Serv., Inc.*, 757 S.W.2d 48 (Tex. App.—Houston [1st Dist.] 1988, no writ), but *Roberts* does not concern an employee's reliance on a promise to promote. *Roberts* merely holds that the at-will nature of an employment contract does not bar a claim based on promissory estoppel "where the employer foreseeably and intentionally induces the prospective employee to materially change his position to his . . . detriment, and then repudiates its obligations *before the . . . contract begins to operate.*" *Id.* at 50 (emphasis added). As in *Larson*, the employer's alleged wrongful act consisted of promising employment in a specific position to induce the plaintiff to enter into the employment agreement, and not promising a promotion to one already retained as an employee at will. *See also Sea-Land Service, Inc. v. O'Neal*, 297 S.E.2d 647, 650 (Va. 1982) (employer failed to hire former employee in new position after using promise of that position to induce employee to resign former position). The other cases on which Morton relies are inapposite.

Morton presents no Texas case holding that reliance may substitute for a specific agreement to alter the at-will nature of an employment relationship. And *Roberts* is of no avail absent a promissory estoppel claim, which Morton does not assert.

B. THE FRAUD CLAIM

Morton contends that the district court erred in entering a directed verdict on his fraud claim. Morton had to prove detrimental reliance on a false representation knowingly made with the intent to induce reliance. *Stone v. Lawyers Title Ins. Corp.*, 554 S.W.2d 183, 185 (Tex. 1977). The misrepresentation that Morton claims is the statement in the May 18 letter that the Board of Directors had approved his promotion. Southern Union's evidence was that there was no Board approval and that

Denius signed the letter without seeing the error there. The district court found that Morton could not have relied on the May 18 letter, given his position in the company and the other circumstances surrounding the letter. We agree. Morton admitted that he drafted the letter himself for Denius' signature. As Southern Union's chief legal counsel and Board secretary, Morton knew that only Southern Union's Board could create the new position of "President and Chief Operating Officer" into which the letter purports to promote him. On these facts, the district court was entitled to conclude that there was no reliance.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1685

THOMAS E. MORTON, JR.,
Plaintiff-Appellant,
versus
SOUTHERN UNION COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ON SUGGESTION FOR REHEARING EN BANC
(Opinion 07/31/92, 5 Cir., 198—, —— F.2d ——)

[Filed September 14, 1992]

Before REAVLEY, DAVIS and DEMOSS, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-89-0939-H

THOMAS E. MORTON, JR.,
Plaintiff

v.

SOUTHERN UNION COMPANY,
Defendant

MEMORANDUM OPINION AND ORDER

[Filed Jun. 17, 1991]

Before the Court are the Motion for Judgment Notwithstanding the Verdict of Defendant Southern Union Company, filed April 19, 1991; the Response of Plaintiff Thomas E. Morton, Jr., filed May 23, 1991; Defendants' Reply, filed June 4, 1991; and the Plaintiff's Motion for Leave to File Response to Defendant's Reply Brief, filed June 14, 1991.

As a preliminary matter, Plaintiff's Motion for Leave to File Response to Defendant's Reply Brief is GRANTED and his Surreply is filed herewith.

I. Background

This case was brought by Plaintiff Thomas Morton, Jr., against his former employer, Defendant Southern Union Company ("Southern Union") alleging violation of Age Discrimination in Employment Act ("ADEA"), 29

U.S.C. § 621 *et seq.*, and breach of contract. Southern Union filed a counterclaim against Morton for breach of fiduciary duty, as Morton had been an officer of Southern Union and its general counsel. The case was tried before a jury, which returned its verdict on April 9, 1991. The jury found for Southern Union on the ADEA claim and one breach of contract claim, and for Morton on Southern Union's counterclaim. The jury found for Morton on a second breach of contract claim, finding that a certain letter written May 18, 1988 constituted an employment contract between Morton and Southern Union, and that Morton's subsequent termination by Southern Union was a breach of this contract. The jury awarded Morton damages of $1,850,000 on that claim.

The letter in question reads as follows:

May 18, 1988

Dear Tom:

It is my pleasure to inform you that the Board of Directors has accepted my recommendation that you be named the President and Chief Operating Officer of Southern Union Company. As you known, your acceptance of this promotion will require a physical relocation for you to the Austin, Texas area. In the meantime, substantial travel must be involved at an inconvenience to you but for the benefit of the Company.

You, of course, are entitled to all benefits under the Company's moving and relocation policy #113 subject to the following modifications:

(i) the value of your Dallas residence is to be determined without using the 90 to 120 day sale criteria;

(ii) equity to be computed as the difference between appraised value and the outstanding mortgage at closing;

(iii) closing date to be no later than 30 days prior to physical move out, with all interest, taxes and other prorations to be made as of that date;

(iv) closing costs (except for major repairs), to be paid by the Company; and

(v) the Dallas residence shall not be shown to prospective purchasers prior to move out. (No rents to be paid between closing and move out date.)

With respect to the purchase of a new residence in the Austin, Texas area, the payment of points (up to three (3) points) on financing for the purchase shall be made by the Company.

If the foregoing properly sets forth our understanding, please sign and return to me a duplicate copy of this letter which will serve as a memorandum of our mutual agreement.

Very truly yours,

SOUTHERN UNION COMPANY

By: /s/ Frank W. Denius
FRANK W. DENIUS
Chairman,
President and Chief
Executive Officer

ACCEPTED AND AGREED

/s/
Thomas E. Morton, Jr.

Southern Union, which unsuccessfully moved for a directed verdict at trial on this claim, moves for judgment notwithstanding the verdict. For the reasons stated below, Southern Union's motion for judgment notwithstanding the verdict is GRANTED.

II. Judgment Notwithstanding the Verdict Standard.

The standard to be applied to a motion for judgment notwithstanding the verdict ("judgment n.o.v.") is the same as that applied to a motion for a directed verdict. *See Long v. Shultz Cattle Co.*, 881 F.2d 129, 132 (5th Cir. 1989). To grant such a motion, the Court must construe the entire record of the case in the light most favorable to the nonmovant and find that the evidence is so overwhelmingly in favor of the moving party that no reasonable juror could have arrived at the disputed verdict. *See id.* The judgment n.o.v. standard in the Fifth Circuit remains the standard articulated in *Boeing Co. v. Shipman. See id.*

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just the evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied . . . . The motions for directed verdict and judgment n. o. v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc); *see Knight v. Texaco, Inc.*, 786 F.2d 1296, 1298 (5th Cir. 1986); 9 C .Wright & A. Miller, *Federal Practice and Procedure: Civil* §§ 2537, 2524-2529 (1971 & Supp. 1991). In a contract case, where the undisputed facts show that the moving party is entitled to judgment as a matter of law, denial of a motion for judgment n.o.v. is reversible error. *See Long v. Shultz Cattle Co.*, 881 F.2d at 132.

III. Analysis.

The Court finds that there was no evidence to support the jury's verdict that Southern Union's termination of Thomas Morton constituted a breach of contract, and that Southern Union's motion for judgment n.o.v. must be granted on that ground.

The Court begins by noting the instructions that governed the jury's consideration of Morton's successful breach of contract claim. After briefly defining the general nature of a contract as a "meeting of the minds," the Court went on to discuss the Texas employment-at-will doctrine.

> Texas follows the "employment-at-will" doctrine. This means that in Texas an employee is presumed to be employed under the condition that the employment relationship may be terminated at any time by either the employer or the employee. This presumption of employment at will may be overcome by Morton if he shows by a preponderance of the evidence that he had a contract of employment with Southern Union for a specific term, or that he and Southern Union expressly agreed that Southern Union did not have the right to terminate him at will.

Court's Charge to the Jury, filed April 9, 1991, at 17.

In the present case there is simply no evidence showing that any contract that may have existed between Morton

and Southern Union provided for his employment for a specific term, or that Morton and Southern Union expressly agreed that Southern Union did not have the right to terminate him at will. Because there is no dispute about these issues, the Court must enter judgment n.o.v. in favor of Southern Union. *See Long v. Shultz Cattle Co.*, 881 F.2d at 132; *Boeing Co. v. Shipman*, 411 F.2d at 374-75.

The employment-at-will doctrine is basic and long standing law in Texas. The Texas Supreme Court in *East Line & R.R.R. Co. v. Scott*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888), held that

> when the term of service is left to the discretion of either party, or the term left indefinite, or determinable by either party, that either may put an end to it at will, and so without cause. When such a state of agreement exists, it is no breach of contract to refuse to receive further services . . . .

For over a century "[t]he courts of Texas have steadfastly refused to vary from that holding." *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733, 734 (Tex. 1985); *see Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723, 723-25 (Tex. 1990) (stating that "[t]he long standing rule in Texas is that employment for an indefinite term may be terminated at will and without cause" and refusing to make an exception to the rule discharge of private employee because of reporting illegal activities); *Lumpkin v. H & C Communications, Inc.*, 755 S.W.2d 538, 539 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (stating that "Texas has a long history as an employment-at-will state, and . . . the 'at-will' rule is followed by Texas courts"); *Salazar v. Amigos Del Valle, Inc.*, 754 S.W.2d 410, 413 (Tex. App.—Corpus Christi 1988, no writ) (reciting the employment-at-will doctrine and stating that a plaintiff can recover for wrongful discharge if he can show that his employment at will was subject to an agreement that he would not be discharged

except for good cause); *Stiver v. Texas Instruments, Inc.*, 750 S.W.2d 843, 846 (Tex. App.—Houston [14th Dist.] 1988, no writ) ("Texas courts follow the traditional rule that absent a specific contract term to the contrary, employment contracts are terminable at will by either party."). The Fifth Circuit has recognized the continuing vitality of the employment-at-will doctrine in Texas. "Although the common-law doctrine of employment-at-will has been under attack in a number of states, Texas courts have not been hesitant to declare that it is alive and well in Texas." *Manning v. Upjohn Co.*, 862 F.2d 545, 547 (5th Cir. 1989).

In order to overcome the legal presumption of at-will employment and to support a finding that his discharge breached an employment contract, an employee must prove that he was employed under a contract for a definite term.

> The general rule is that when a contract provides that one party shall render services to another, or shall 'work' for another, but does not specify a definite time or prescribe the conditions which shall determine the duration of the relationship, the contract may be terminated by either party at will. Where the tenure of employment is not conclusively shown by the contract, the presumption is that the employment is at will, and the party relying on such a contract must overcome the presumption by showing facts and circumstances establishing some tenure of employment.

Horn v. Builders Supply Co., 401 S.W.2d 143, 149 (Tex. Civ. App.—Tyler, 1966, writ ref'd n.r.e.). Alternatively, a discharged employee may overcome the strong presumption of at-will employment by proving that he was employed under a contract that expressly limited the employer's right to terminate the employment relationship at will. For example, the court in *Schroeder v. Texas Iron Works, Inc.*, 769 S.W.2d 625, 628 (Tex. App.—Corpus Christi 1989, no writ), held that "[t]o establish

a cause of action for wrongful discharge, one must prove that . . . he and his employer had a contract that specifically provided that the employer did not have the right to terminate the employment contract at will . . . ." *See Webber v. M.W. Kellogg Co.*, 720 S.W.2d 124, 127, 128 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (affirming summary judgment in favor of employer where letter offering position did not promise future employment and stating that "[i]t can hardly be said that classifying [plaintiff] as a permanent employee, as opposed to a temporary employee, is a promise of lifetime employment"). Indeed, in *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d 403, 406 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.), the court stated that for an exception to the employment-at-will to apply, "the writing must, *in a meaningful and special way*, provide that the employer simply does not have the right to terminate the employee at will."

In the present case, the May 18, 1988 letter from Denius to Morton, signed and accepted by Morton, contains no reference to a specific term of employment, nor does it specifically provide that Southern Union did not have the right to terminate the employment contract at will. Indeed, Morton neither alleged nor provided evidence of any specific agreement which might defeat the presumption of at-will employment.

Morton offers two arguments against the presumption of at-will employment in this case. First, Morton contends that his status as an at-will employee is irrelevant to the contract at issue here. *See* Plaintiff's Response at 15-18. The gist of this argument is that a promise to promote an employee is different from a promise to employ someone, and therefore that the promotion contract can be enforced without regard to the employment-at-will doctrine. The Court finds this argument lacking in merit; the contract at issue here so plainly was an employment contract that to treat it otherwise would mean ignoring the terms of the May 18, 1988 letter. Furthermore, the

jury was instructed by the Court, with no objection from Morton, that his claim under the May 18, 1988 letter was for breach of an employment contract. *See* Court's Charge to the Jury at 17 ("Plaintiff Thomas Morton alleges that his termination by Defendant Southern Union Company was a breach of an employment contract.")

Morton's second argument is that the jury could reasonably find under the circumstances that Southern Union did not have the right to terminate Morton at will. *See id.* at 18-22. The only circumstance outside the terms of the May 18, 1988 letter to which Morton can point as evidence of Southern Union's lack of authority to terminate him at will was the sale of his Dallas residence and other acts related to his plans to reloctae to Austin. This fact, however, is insufficient to meet the requirement under Texas law that Morton show circumstances indicating that he and Southern Union had agreed to a specific tenure of employment, or that Southern Union expressly abdicated its right to terminate him at will. *See Schroeder v. Texas Iron Works, Inc.*, 769 S.W.2d at 628; *Benoit v. Polysar Gulf Coast, Inc.*, 728 S.W.2d at 406; *Vallons v. Agip Petroleum Co.*, 705 S.W.2d 757, 758-59 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Horn v. Builders Supply Co.*, 401 S.W.2d at 149. Morton also suggests that the May 18, 1988 letter constituted a promise not to terminate him without good cause. *See* Plaintiff's Surreply at 5, 5 n.5. No evidence supports this convention, however.

Having examined all of the evidence viewed in the light most favorable to Morton, the Court finds that no reasonable juror could have arrived at the disputed verdict and that Southern Union is entitled to judgment notwithstanding the verdict as a matter of law.

IV. Conclusion.

For the reasons stated above, Defendant Southern Union Company's Motion for Judgment Notwithstanding the Verdict is GRANTED.

SO ORDERED.

DATED: June 17, 1991.

/s/ Barefoot Sanders
BAREFOOT SANDERS
Chief Judge
United States District Court
Northern District of Texas

APPENDIX D

EXCERPT FROM DISTRICT COURT'S RULING ON DIRECTED VERDICT

* * * *

[13] THE COURT: I don't think you are treating me right on that because I was very interested in your telling me yesterday that your fraudulent claim was tied to the house.

MR. GILLESPIE: Mr. Morton testified, Your Honor, that had he not been given this promise and had he not thought he was going to stay on with the company as the President he would have looked for other work and he was marketable at age fifty-two and the number two guy in the company. He is not marketable now that he has been fired. We have got the loss wage certainly as part of the age claim and so to some degree I think there is a duplication but we're not trying to recover twice. We also have a claim for punitive damages on the fraud claim. Punitive damages are not duplicitious and that is not a double recovery. It is a separate thing we are entitled to if the jury finds this was done with malice.

THE COURT: I'm going to grant the Motion on the fraudulent claim. I don't think there is reasonable reliance. I would not support a jury finding of fraud. I don't think considering the circumstances of the parties and specifically the Plaintiff and where he stood in the company and what was said that there possibly could have been reasonable reliance in terms—in the way that is used in the definition of fraud or fraudulent inducement. In addition to that I don't think there is a figure before the jury even granting the admissions so called against interest as it flows from the March 26th meeting that [14] there is a figure which establishes that as the necessary measure or as the measure of damages and fraud and I would not be able to support a finding of damages in fraud and of course punitive would have to

rest on that. That is so far as the house is concerned and I take it that is all we are concerned with in fraud.

I think the rest of it has to do with the contract claim and/or the age discrimination as to which we would have to sort that out. I don't think there is any fraud here and I don't—obviously all elements of fraud have got to be established. I have addressed two of them. That is enough. So I grant the Motion on Fraud.

* * * *

APPENDIX E

PLAINTIFF'S EXHIBIT 32

SOUTHERN UNION COMPANY
1800 Renaissance Tower
Dallas, Texas 75270
(214) 748-8511

THOMAS MORTON, JR.
Executive Vice President
General Counsel & Secretary

February 17, 1989

Frank W. Denius, Esq.
700 Lavaca, Suite 700
Texas Commerce Bank Building
Austin, Texas 78701

Dear Frank:

RE: RELOCATION TO AUSTIN, TEXAS

Attached for your review is a copy of your letter to me dated May 18, 1988, regarding my relocation to Austin, Texas.

I respectfully request the opportunity to discuss this and other related matters with you at your convenience.

Very truly yours,

/s/ Tom
THOMAS E. MORTON, JR.

TEM:cw
Attachment

SOUTHERN UNION COMPANY
1800 Renaissance Tower
Dallas, Texas 75270
(214) 748-8511

FRANK W. DENIUS
Chairman of the Board
President
Chief Executive Officer

May 18, 1988

Thomas E. Morton, Jr.
Executive Vice President, General
Counsel & Secretary
Southern Union Company
1800 Renaissance Tower
Dallas, TX 75270

Dear Tom:

It is my pleasure to inform you that the Board of Directors has accepted my recommendation that you be named the President and Chief Operating Officer of Southern Union Company. As you know, your acceptance of this promotion will require a physical relocation for you to the Austin, Texas area. In the meantime, substantial travel must be involved at an inconvenience to you but for the benefit of the Company.

You, of course, are entitled to all benefits under the Company's moving and relocation policy #113 subject to the following modifications:

(i) the value of your Dallas residents is to be determined without using the 90 to 120 day sale criteria;

(ii) equity to be computed as the difference between appraised value and the outstanding mortgage at closing;

(iii) closing date to be no later than 30 days prior to physical move out, with all interest, taxes and other prorations to be made as of that date;

(iv) closing costs (except for major repairs), to be paid by the Company; and

(v) the Dallas residence shall not be shown to prospective purchasers prior to move out. (No rents to be paid between closing and move out date.)

With respect to the purchase of a new residence in the Austin, Texas area, the payment of points (up to three (3) points) on financing for the purchase shall be made by the Company.

If the foregoing properly sets forth our understanding, please sign and return to me a duplicate copy of this letter which will serve as a memorandum of our mutual agreement.

Very truly,

SOUTHERN UNION COMPANY

By /s/ Frank W. Denius
FRANK W. DENIUS
Chairman
President and Chief Executive Officer

ACCEPTED AND AGREED:

/s/ Thomas E. Morton, Jr
THOMAS E. MORTON, JR.

APPENDIX F

PLAINTIFF'S EXHIBIT 31

INTEROFFICE CORRESPONDENCE

To Tom Morton
Relocation to Austin, Texas
(Your letter of February 17, 1989)

From Frank Denius

Date February 20, 1989

On May 18, 1988, plans were in place to move Corporate headquarters to Austin on or about September 1, 1988.

I met with you and Ron and we discussed management positions for Austin.

You were aware of the June 1988 Goldman decision. This, as you know, has caused delay in some of our decisions. You have been completely aware of the delays and the reasons therefor.

I will be glad to meet with you to discuss this subject although I think the facts are pretty clear.

/s/ Frank Denius

FD:hc

APPENDIX G

THOMAS E. MORTON—DIRECT

* * * *

[II-57] Q At that point who became Chairman of the Board?

A Mr. Frank Denius became Chairman of the Board.

Q So at that time you had someone to become Chairman who was also President?

A Right. He became President and Chairman in '86.

* * * *

[II-63] Q (By Mr. Gillespie) Let me hand you what has been marked as Exhibit 66 and I have shown a blow-up of that to the jury. What is that?

A This is the letter that Frank Denius gave me which confirmed his oral Advice that the Board has accepted my recommendation that you, you being Tob Morton, be named as President and Chief Operating Officer of Southern Union.

* * * *

[II-64] Q (By Mr. Gillespie) Mr. Morton, tell the jury exactly how that document came into being.

A This document came into being after I had had several meetings with Frank Denius about the proposed organization of the company after relocation to Austin. He and I and Ron Endres met and discussed the table of organization and I had previously prepared earlier at Mr. Denius' request the letter that Mr. Endres got when he relocated to Austin in 1986 to become President of the Gas Utility Division. Mr. Denius said

> "I want to make sure that you get the same deal that Ron got as far as benefits so why don't you get that letter and draft up something for me to look at"

which I did.

Q So you drafted this yourself?

A Yes, which is normal because, you know, as the General Counsel for the company I prepared a lot of documents for the President's review.

Q Did he tell you what it should contain?

A Yes.

Q What did he tell you it should contain?

A He said his recommendation to the Board was that I would be President and Chief Operating Officer. He would continue as Chairman and Chief Executive Officer.

Q And as he gave this information to you did he tell you that he had made any recommendation to the Board? [II-65] A Yes.

Q Did he tell you they had accepted that recommendation?

A He said he had made the recommendation to the Board in executive session.

Q Did he tell you that they had accepted it?

A No.

Q That is in the letter.

A I know.

Q All right. Explain to the jury how that got into the letter.

A It got in the letter because that is what Mr. Denius told me and that is what I wrote and that is what he signed.

Q All right. Did you physically hand that letter to him in his office?

A Yes.

Q Were you present when he read it?

A Yes.

Q Describe to the jury whether you were in position to observe whether Mr. Denius read this letter before he signed it?

A I was standing right next to him.

Q All right.

A He had previously asked me for a copy of Endres' letter which I had provided him and he wanted to compare the two which he did.

Q All right.

[II-66] A And then he asked some questions about the relocation policy and I showed him, you know, the actual policy and he wanted to make sure that I got the same relocation benefits as Ron but of course there was a distinction. Ron was the head of the Utility and I was going to be President of the entire company.

Q All right. Did Mr. Denius ask you any questions as he read over this document before he signed it?

A Well, he made some changes on there. I had made an earlier draft.

Q All right. This document doesn't show any changes.

A No, no. I mean you always draft something up. You know, it would be presumptous of me to do that letter without his input which is common practice.

Q I am now at the point where you have got this document.

A Yes.

Q Not a draft but this particular document and you have handed it to Mr. Denius?

A Yes.

Q What did he do and what did you do?

A I stood there and he read it and he signed it and I signed it.

Q All right. And how could you tell he read it before he signed it?

A I watched him read it and Mr. Denius, you know, was an attorney himself and he had always been very careful about what [II-67] he signed and was very meticulous and prided himself in that regard.

Q All right. Had you had conversations with Mr. Denius here at this time or about this time about your future role in the company and your role versus that of Mr. Endres?

A Yes, we had had several lunches and I had gone with him on more than one occasion. When Mr. Denius came up to Dallas he would stay at the, well, it is now

called Hilltop Inn. It used to be the Hilton at Mockingbird and Central and we went to dinner at Trader Vic's and we talked about the table of organization and he said that he didn't want to continue as CEO forever but for the time being that was the role that he thought it would be best to be Chairman and CEO, that I would be President and Chief Operating Officer and Mr. Endres would be Executive Vice-President in charge of the Utility operation.

Q What else did he say?

A He also said he didn't feel that Mr. Endres, based on his training and experience, had the credentials to be a CEO of a New York Stock Exchange listed company. He just hadn't had the breadth of experience that I had had.

Q What was his approximate age?

A Well, he had also told the Board that.

Q He said that?

A Yes.

* * * *

[II-68] Q All right. What did you do with the letter after it was signed by Mr. Denius?

A Well, I kept a copy for myself since it was addressed to me and I gave a copy to Mr. Denius' secretary.

Q When did you find out for the first time that Mr. Denius claims he never recommended you as President to the Board of Directors?

A At his deposition in this litigation.

Q After the suit was filed?

A After the suit was filed.

Q When he told you that he had recommended you as President that the Board had accepted that recommendation did you believe him?

A Yes.

Q And did you—

A I had no reason not to.

Q Did you do anything to act upon that recommendation?

A Yes, I did.

Q What did you do?

A I sold my house.

Q Now, I will cover that in a little bit in detail later but let me ask you, to get to the end of your story and tell us when [II-69] you were terminated? Let me hand you Plaintiff's Exhibit 48. My question to you is when were you terminated?

A When was I terminated?

Q Right.

A March 29th, 1989 at 5:01 P.M.

Q And when were you first given a stated reason for the termination?

A When I got this letter about five o'clock on March 28th.

* * * *

[II-70] Q (By Mr. Gillespie) Turn the exhibit over to the third page, sir.

A The third page. If I can read a sentence on the first page. It says

> "We have provided you with a package of severance benefits if you choose to resign before the close of business on March 29, 1989, an outline of which is attached"

and attached is an outline of quote

> "Major severance considerations."

Q All right. And was there a significant amount of money being offered to you if you would resign?

A Yes, they offered me a retainer for twenty-four months.

Q Full salary for twenty-four months?

A No, it was about, a little less than ninety percent but of course it was much less than that because I had no benefits.

Q All right. And did you cost out how much money was included in that package?

A Yes, I did.

Q Do you recall what it was approximately?

A Well, the retainer was two hundred seventy thousand and they said they would remove the restrictions on my restricted stock which is one hundred twenty thousand and then the right to [II-71] exercise options was about ninety thousand so you had two hundred thousand plus ninety—

Q Three sixty.

A —plus one hundred twenty and then they would reimburse me for the loss on the sale of my Dallas residence which was about fifty.

Q All right. And you have also got an item listed retirement plan benefits?

A Yes.

Q That is something you would receive anyway?

A Yes.

Q All right. Now, let me ask you because we will come back to why you didn't take that. Well, I will ask you now. Why didn't you take that?

A Basically it was unfair. It was rammed down my throat as a twenty-four hour take it or leave it and at my age, age fifty-two I planned on finishing my work career at Southern Union. I have got a heart problem where I cannot buy private insurance. I can't get medical insurance for a heart problem. Mr. Denius knew that. He also knew, because I reminded him, that under Federal law there is a statute called COBRA that says that it you fire an employee you have to cover him for eighteen months but he has to pay for the premiums. Well, it has been more than eighteen months. I asked the company if they would continue voluntarily and they refused so I have had to go on out and buy a ——

[II-72] Q All right. Now, when he told you that he was going to cut your responsibilities did he tell you who would get the number two slot instead of you?

A He said Mr. Endres.

Q Is that the same Mr. Endres who he said to you back in May of '88 lacked executive experience?

A Right.

Q Had Mr. Endres got any executive experience in the meantime?

A He had the same job.

* * * *

[III-10] Q All right.

A He said he was concerned about my interest in the utility and the fact that the Division General Counsel of the Gas Utility had been terminated by Mr. Denius. He had a young lawyer down there by the name of Rob Wright who apparently felt that he needed more supervision. Well, we had a geographic disparity between the Austin and the Dallas location and I sat down with Mr. Denius, Mr. Wright and Mr. Endres, who was Mr. Wright's immediate supervisor, and we talked about some of the problems and I told Mr. Denius

> "Well, you know this is going to take care of itself when I move to Austin."

I had made several trips to Austin and talked to Mr. Wright, took him out to dinner, got a list of his problems, reviewed who he was seeking as outside counsel and how he was handling various matters.

* * * *

[III-26] Q All right. Mr. Morton, I am going to move to another area and that is your losses as a result of being terminated.

What is the main component of your losses?

A Basically lost wages.

Q We're going to have an economist that you have retained to put together these numbers in great detail but let me ask you. Had you not been terminated at Southern Union would you have continued to work?

A Certainly. If I knew that this was coming a lot of this could be avoided. You know, while I was still employed I could have looked for other work.

Q Looking back at May 18, 1988 when Mr. Denius gave you a letter saying he was pleased to announce that the Board accepted his recommendation of your promotion. If you had known then that that was false what would you have done?

A Well, I would never have sold my house and I would start looking for other work.

Q And as the existing number two man in the company and as General Counsel were you marketable at that point?

A Yes and the economy was better then.

* * * *

[III-27] Q * * * Let me show you Plaintiff's Exhibit 63 and also Plaintiff's Exhibit 120. What is Plaintiff's 63?

A Plaintiff's 63 is a letter dated September 30, 1988 signed by Frank Denius as Chairman and President and Chief Executive Officer addressed to the landlord of Renaissance Tower which is the old First International Building.

Q All right. And what does it do?

A It gives the landlord notice that Southern Union is relocating its offices to Dallas.

Q All right. First if you would it is dated September 30, 1988. Read to the jury the last sentence in the first paragraph.

[III-28] A "Southern Union intends to move its Dallas office operations to Austin, Travis County, Texas in the next few months."

Q All right. Now, would you read the first sentence of the third paragraph to the jury.

A "In accordance with the termination provisions of the lease, a check in the amount of $654,186.38 is enclosed."

Q Okay. Now, on the second page of Plaintiff's Exhibit 63 who signed that document?

A Frank W. Denius.

Q Okay. And this was some months after the May 18th letter to you?

A Yes.

Q Now, let me show you two sets of by-laws, Plaintiff's Exhibit 119. What is the date of Plaintiff's Exhibit 119?

A That is August 15th—16, 1988.

Q All right. And so this was just before the letter to Prudential Insurance Company, is that right?

A Yes, it was about six weeks.

Q All right. And who signed off on these Minutes as approved?

A These were approved by Frank W. Denius as Chairman of the Board.

Q All right. And would you read to the jury Item No. 7 of the Minutes?

[III-29] A Item No. 7 says

> "Delayed the relocation of the corporate office to Austin, Texas pending further study."

Q All right. Now, look at Plaintiff's Exhibit 120. Are those the Minutes of the company dated two days before the letter to the Prudential Insurance Company?

A Yes, they are dated September 28th.

Q All right. And—of '88?

A Yes.

Q Who signed off on that?

A Frank W. Denius, Chairman.

Q Would you read Item No. 5 of those Minutes to the jury, 5?

A Item No. 5 says

> "Approved the termination of the office lease at Renaissance Tower and various severance compensation agreements with respect to the relocation of the corporate office to Austin, Texas."

Q I guess it goes without saying the Renaissance Tower is here in Dallas?

A Yes.

Q All right. Let me show you a couple of more exhibits that relate to the sell of your house, Mr. Morton. What are Plaintiff's Exhibits 13 and 16?

A Plaintiff's Exhibit 13 is a Contract of Sale between my wife and myself to the Relocation Company that worked for the company [III-30] Southern Union Company and it is dated October 6th, 1988.

Q When you look at Plaintiff's Exhibit 13 and—what is the other exhibit, 13?

A That was Exhibit 13 there.

Q All right.

A Exhibit 16 is an Equity Statement which was basically a closing statement.

Q And what does it show?

A It shows that the house was transferred, the title was transferred on October 26th, 1988.

Q All right. And this transfer of your house was from your ownership to whom?

A To the Relocation Company.

Q All right. And so you actually sold your house two months before this December 8th meeting with Mr. Denius?

A Yes.

Q And do these documents show how much money you lost on the house?

A Yes.

Q How much?

A About fifty-six thousand dollars.

Q All right. And how so?

A Well, if you are—I think you have to go back and look at the original Deed where I acquired the house. That is a separate exhibit and this shows what the company paid me.

[III-31] Q All right.

A And the obvious reason I sold the house was I was relying on the May 18th letter and I felt that the prospect of being President would more than upset any loss that I would incur on this house.

Q Good. Let me now ask you about something called a Severance Compensation Agreement. What is a Severance Compensation Agreement, Mr. Morton?

A That is a contract that the company provided me with and several other key executives wish said in the event of a change of control and it only could have been in the event of a change of control. In other words, someone else would come in and take over the company. That if your duties change and we all know in mergers they always say at the day of closing

"We're going to keep everybody. We love them"

And three months later you don't recognize the place. In the event of a change of control you are entitled to severance benefits.

Q All right. Basically—let's not get too detailed about this. Did you have a Severance Compensation Agreement?

A Yes, it was approved by the Board.

Q And did it provide for—in the event of one of the triggering conditions which is either your termination or within a certain period of time or a change of your duties, did it provide for three years' salary minus one hundred dollars?

[III-32] A Yes, which was the formula established by the Federal Government from the Internal Revenue Code.

Q All right. Let me show you Plaintiff's Exhibit 26. Is that your Severance Compensation Agreement with the company?

A Yes, it is.

Q When was it originally put in place for you, sir?

A It was originally put in place in December of 1984.

* * * *

Q All right. Mr. Morton, the first page of Plaintiff's Exhibit 26 shows the most recent amendment of that Severance [III-33] Compensation Agreement prior to your termination—

A Yes.

Q —does it not? What is the date on that?

A The date of the amendment is May 20, 1988.

Q And who signed it?

A Frank W. Denius.

Q And did you also sign it?

A Yes.

Q And the terms of this did you agree on?

A Yes and the term of the Agreement was extended until April 3, 1992.

Q Was that an amendment in your favor?

A And in the company's favor.

Q Now, until December 8th, 1988 and then again February 16th of 1989, the dates we cover in detail here, the testimony here, had anyone from Southern Union ever suggested to you that you were not highly valuable to Southern Union?

A No. In fact quite to the contrary I felt that the Executive Compensation Committee on at least two occasions refused to cut my salary and I took that as a vote of confidence.

* * * *

THOMAS E. MORTON, JR.—CROSS

* * * *

[182] Q Actions of the Board of Directors have to be recorded as resolutions and the minutes of the meeting of the Board, correct?

A Correct.

Q And that requires generally the Secretary to make them part of the minutes so that the Board can adopt those minutes or make sure that they are recorded as the acts of the Board, correct?

A In some instances, yes. In some instances the Board takes action that doesn't require a formal resolution.

Q Well, if it doesn't require a formal resolution it is not a formal action, is it?

A Not necessarily. The Board could decide to do something in the future and choose for one or more

reasons not to announce it at that particular point in time.

Q For example, if the Board meets in executive session as it obviously does in order to discuss employment issues of officers, it would announce the resolution to the secretary so that he could prepare minutes for the Board's approval, correct?

A Yes, but frequently there was a long time lag and in many cases personnel matters, executive changes were not announced until they were actually to take effect.

Q And that is when the—

A In other words, a management succession plan, if the Chairman for whatever reason decided to resign, retire, do something else he would make his wishes known to the other Board members. They would discuss it. Maybe the actual leaving would [183] be six months or even a year down the road. You wouldn't announce it at that time because then the rest of the Board would deliberate and decide on a successor and that may take a long period of time.

Q Yes, sir, but nothing has happened until he has actually decided to leave and has a successor elected, right?

A They may have chosen the successor but chosen for whatever reason not to announce it. It is not required—it is not required to report future events.

Q Well, actually, though, until something happens the Board can change its mind, right?

A They could.

Q And in fact the only way you can have any evidence of what the Board did is by looking at the minutes of the meetings, right?

A That is not correct.

Q How else can you get evidence of what the Board did?

A The Chairman can tell you. Not every action of the Board requires a formal resolution or is required to be put in the minutes.

Q What action of the Board is not required to be put in the minutes if it is an action of the Board, not just a discussion.

Q It depends on the timing.

THE COURT: This gets pretty inconclusive. Is there some direction we're are headed here rather than a test?

[184] Q (By Mr. Blumenthal) I am saying as Secretary of the Company when the Company—when the Board of Directors had an action they told you about it so you could prepare minutes?

A Not necessarily, Mr. Blumenthal. A perfect example would be, and I will be as brief as I can. The Company had decided to sell the gas processing plant but they didn't want the whole world to know that had decided to sell the plant because if the whole world knew it would affect our negotiating power to get the best price. They decided to sell the plant at that point in time they did not pass a formal resolution and that was only done after the Agreement was negotiated, signed and closing was set and as a condition of closing a certified Board resolution was delivered with the closing document wherein we transferred title and received payment.

Q Because you really couldn't vote on the sale of the plant until you knew what the terms were and who the purchaser was and what you could vote on, correct?

A You didn't want to denigrate your negotiating position. There is a multitude of reasons why you wouldn't do that, all good business reasons.

Q At any rate, when the action was adopted, that is something that was going to become effective, then you have got to have it in the minutes, right?

A Eventually.

Q All right. And that is up to the Secretary to get it into [185] the minutes, correct?

A That is not correct. I can only write minutes that the Chairman approves. I am a recording secretary. The Chairman prepares the agenda, decides what is discussed at the Board meeting and thereafter advises me as to the

formal actions of the Board if I was present or absent for one or more sessions.

Q Well, but until somebody prepares the minutes it hadn't happened, right?

A It may have happened. It just hasn't been recorded.

* * * *

APPENDIX H

FRANK DENIUS—CROSS

* * * *

[IV-42] Q You went to the University of Texas Law School, did you not?

A Yes, sir, I graduated from the University of Texas Law School in January of 1949.

Q And you have been a licensed attorney ever since, have you not?

A Well, since May of 1949. I took the Bar in March or April of that year and passed and became a lawyer I think it was in early May.

Q The University of Texas Law School is in Austin is it not?

A Yes, sir.

Q And it was then and is now an excellent Law School, isn't it?

[IV-43] A I take a lot of pride in the University of Texas generally and I am very pleased and proud to be a graduate, yes, sir.

Q And one of the things that they do at the University of Texas Law School or at least they say they do is to teach you to think like a lawyer, isn't that right?

A To think like a lawyer?

Q Yes, sir.

A Yes, sir, I think that is true.

Q And once you learn that you continue to think like a lawyer whether you want to or not, isn't that right?

A Well, I don't know whether—I think we all try to aspire to that, yes, sir.

Q In Law School the first year one of the classes that is required, one of the few classes that is required is Contracts, isn't that right?

A What?

Q In Law School the first year one of the major courses that is required of a Freshman is Contracts?

A Contracts, yes, sir.

Q And in Contracts one of the things that you cover is what is called the four corner document, isn't that right?

A I certainly know what the four corner document is and I believe I learned it at Law School.

Q All right. And generally that involves what the contract means depends upon what it says within those four corners, isn't [IV-44] that right?

A Yes, sir, you're not supposed to isolate sections. You are supposed to read it in its entirety.

Q Right. And in order to understand to know what a contract is you are taught in Law School that you have to read every word, isn't that correct?

A Well, I would certainly think so.

Q Also in Contracts they teach you about the doctrine of offer and acceptance, don't they?

A In the course of Contracts you will discuss offer and acceptance.

Q And the offer is when someone offers to do something and the acceptance is when that offer is accepted?

A When the person making the offer has the rights, yes, sir.

Q I would like to show you now a letter that you signed dated May the 18th, 1988 That is Plaintiff's Exhibit 66.

MR. GILLESPIE: May I approach the witness?

THE COURT: Sure,

Q (By Mr. Gillespie) Mr. Denius, is that your signature on Plaintiff's Exhibit—

A That is my signature on Page 2, yes, sir.

Q You read it before you signed it, didn't you?

A No, sir, I did not.

Q The other signature on Plaintiff's Exhibit 66 is Mr. Mortons', isn't it?

[IV-45] A Mr. Morton's signature appears on Page 2.

Q And you know what the term accepted and agreed means do you not?

A Yes, sir, as I said earlier when you have authority you can make the offer.

Q Now, is it your testimony to the jury—let me just ask you if you would—I know it is—I will go ahead and read—read to the jury the first sentence of Plaintiff's Exhibit 66. I have some question about that after you read it.

A The first sentence?

Q Yes, sir.

A "It is my pleasure to inform you that the Board of Directors has accepted my recommendation that you be named President and Chief Operating Officer of Southern Union."

Q It is your testimony to the jury that before you signed this document you did't read even the first sentence of it?

A It is my testimony that I did not read the letter and I can explain if you would like.

Q Mr. Morton came to your office with this letter, is that your testimony?

A Mr. Morton originally came to my office several days before May 18th and asked me, he said

> "Frank, can I have the same type of deal with my house as Mr. Henderson had."

[IV-46] And I said

"Yes, sir, that is company policy"

And that was my response to him. On or about the 18th of May he came in and I believe it was shortly before we all left to go over to the stockholders and Directors meeting and handed me a letter and I signed that letter which is dated May 18, 1988 and he stood in front of my desk, I signed it and I said

> "Of course, you know the relocation must be approved by the Board of Directors."

I relied on Mr. Morton and that is the explanation that I have to that.

Q Mr. Denius, you did not recommend to the Board of Directors that Tom Morton be named the President

and Chief Executive Officer of Southern Union Company, did you?

A I never made that recommendation although I did tell the Board in April and May of—early May of that year that I was considering it.

Q All right. Mr. Denius, Mr. Morton never received the promotion to President, did he not?

A No, sir, he did not. He was never elected to the position by the Board.

Q And you never recommended the promotion, did you?

A I never recommended it although I did have some discussions with the Board on different things regarding the plan of relocation which would have included Mr. Morton becoming the [IV-47] position that he listed and is named in the letter.

Q Mr. Denius, the Board never took a vote on Mr. Morton becoming the President and Chief Operating Officer of Southern Union, did it?

A Yes, sir, you are correct. The Board never did vote on it and I never did recommend it to them.

Q And you knew on May 18, 1988 the difference between saying you made a recommendation and saying you might make a recommendation?

A Why certainly and but as I stated to you previously I did not read the letter. I had confidence in Mr. Morton at that time. He understood company policy and what the requirements were.

Q Is it your sworn testimony here to this jury that you did not even glance over the letter before you signed it?

A Mr. Gillespie, I think all my testimony is sworn this morning and it is my testimony that I did not glance over the letter. He came in and presented that letter and said

"This is my residence letter or house letter"

and I signed it while he was standing there.

Q Mr. Denius, your testimony is that he said it was a house letter, is that right?

A He may have said residence.

Q All right. Look at that first paragraph. It doesn't say anything about a house, does it?

[IV-48] A Well, if you took it by the four corners you will find that the whole purpose is the relocation which deals with a house which deals with a policy.

Q Well, if you construe it by the four corners you have got to read every word of it don't you, Mr. Denius?

A Once I am reading it I am reading it now. I am not going to isolate just one sentence of a page and a half letter.

Q But my question to you is was the first paragraph does not talk about the house, does it?

A The first paragraph you are right.

Q Thank you.

A Not—

Q Now, you—

A There is a sentence that—in the first paragraph the last sentence is

> "In the meantime substantial travel must be involved as an inconvenience to me but for the benefit of the company"

so that deals with in my opinion a relocation which is the purpose of the balance of that letter.

* * * *

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-89-0939-H

THOMAS E. MORTON, JR.,
Plaintiff

v.

SOUTHERN UNION COMPANY,
Defendant

COURT'S CHARGE TO THE JURY

[Filed April 9, 1991]

Before Arugment

MEMBERS OF THE JURY:

Now that you have heard the evidence, it is my duty to instruct you as to the law that is applicable to this case. I will instruct you regarding the law that you should apply in answering certain questions of fact in the case, and I will read to you those questions.

* * * *

Plaintiff's Contentions

This is a civil suit in which Plaintiff Thomas Morton makes three claims against Defendant Southern Union arising out of his termination in March of 1989.

* * * *

Plaintiff's third claim, also for breach of contract, is based on the letter of May 18, 1988. Morton contends that the May 18, 1988 letter contractually bound Southern Union to promote Morton to the position of President and Chief Operating Officer of Southern Union, and that by discharging Morton Southern Union breached that promise.

* * * *

Defendant's Contentions

* * * *

Regarding the claim for breach of contract arising out of the May 18, 1988 letter, Southern Union contends that it contains no promise by Southern Union to retain Morton in any capacity for any period or to employ him as President and Chief Operating Officer of Southern Union.

* * * *

Plaintiff's Third Claim: Breach of Contract

Plaintiff Thomas Morton alleges that his termination by Defendant Southern Union Company was a breach of an employment contract. Morton contends that the letter signed by Frank Denius of May 18, 1988 contractually bound Southern Union to promote Morton to the position of President and Chief Operating Officer of Southern Union.

Again, a contract is a promise to which the law attaches legal obligations; that is, a contract is a promise a court will enforce. In order to create a contract, there must be an agreement between the parties, a meeting of the minds, about the terms of the contract. A contract may be written, oral, or created by the conduct of the parties, but in all cases the parties must intend for there to be a contract.

Again, Texas follows the "employment-at-will" doctrine. This means that in Texas an employee is presumed to be employed under the condition that the em-

ployment relationship may be terminated at any time by either the employer or the employee. This presumption of employment at will may be overcome by Morton if he shows by a preponderance of the evidence that he had a contract of employment with Southern Union for a specific term, or that he and Southern Union expressly agreed that Southern Union did not have the right to terminate him at will.

Question 8

Do you find by a preponderance of the evidence that the May 18, 1988 letter constitutes a written employment contract?

Check only one answer:

"We do so find" ✓

"We do not so find" _____

On this question, Plaintiff has the burden of proof.

If you answer "We do so find", proceed to Question 9. If you answer "We do not so find", proceed to page 20.

Question 9

Do you find by a preponderance of the evidence that the termination of Morton by Southern Union was a breach of the May 18, 1988 contract of employment?

Check only one answer:

"We do so find" ✓

"We do not so find" _____

On this question, Plaintiff has the burden of proof.

If you answer "We do so find", proceed to next page. If you answer "We do not so find", proceed to page 20.

Damage for Breach of Contract

For this claim, Plaintiff's damages, if any, are the difference between the value of Morton's employment contract with Southern Union less any wages, salary, and benefits Morton could have earned with the exercise of reasonable diligence. "Reasonable diligence" means that diligence which a person of ordinary prudence in the same or similar circumstances as Plaintiff Thomas Morton would have exercised.

Plaintiff Thomas Morton has the burden of proving his contract damages by a preponderance of the evidence. Defendant Southern Union has the burden or proving by a preponderance of the evidence how much mony Morton could earn in the exercise of reasonable diligence.

Question 10

What amount of money, if paid now in cash, would compensate Plaintiff Thomas Morton for Southern Union's breach of the May 18, 1988 contract of employment?

Answer in dollars and cents, if any:

$1,850,000.00

On this question, Plaintiff has the burden of proof. Proceed to next page.

* * * *

Your foreperson will sign in the space provided below after you have reached your verdict.

DATED: April 8, 1991

/s/ Barefoot Sanders,
BAREFOOT SANDERS
Chief Judge
United States District Court
Northern District of Texas

VERDICT OF THE JURY

We, the jury, have answered the above and foregoing questions as indicated, and herewith return the same into court as our verdict.

/s/ Janette Richardson
Foreperson

Dated: April 7, 1991.

APPENDIX J

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is necessary and appropriate in this case because of the complexity and importance of two disputed issues. The district court has greatly extended the effect of the Texas "at will" employment doctrine, without any basis in a decided Texas case.

A unanimous jury found Southern Union breached its contract with Tom Morton and owed him $1.85 million. However, because of the Texas at-will doctrine, a Texas employer is free to enter into a written agreement to promote an existing employee in exchange for his continued service and work that is agreed to be detrimental to the employee and for the benefit of the company and refuse to perform the employer's promise—to promote the employee. The employer may enter into this agreement deliberately, intentionally, but secretly intending never to perform its part of the agreement. Even after Morton performed his part of the agreement and sold his residence in reliance upon the agreement to relocate, the employer may refuse to promote and instead fire Morton with impunity from breach of contract and fraud liability because of the at-will doctrine. This is the district court's incorrect holding.

APPENDIX K

SUPPLEMENTAL STATEMENT REGARDING ORAL ARGUMENT

SU ("SU") contends this case presents easy questions of law. It is probably not enough that SU's brutal "so what?" defense to a written agreement offends basic notions of justice. But it is a start, and Appellant respectfully submits that oral argument will be helpful to the Court in meeting its obligation to determine Texas law, *City Public Service Board v. General Electric Co.*, 935 F.2d 78 (5th Cir. 1991). SU can point to no case that holds an employer has a contract right under Texas law to enter into a written agreement to promote an employee and then, after that employee performs his part of the agreement, sells his residence in reliance upon the agreement to relocate, to refuse to promote and instead fire the employee with impunity because of the at-will doctrine. Morton cites pertinent Texas and Fifth Circuit authority and rulings of the Supreme Courts of South Dakota and Virginia.

SU pleads that oral argument is unwarranted because "basic contract law" requires a holding that the May 18, 1988 letter "was insufficient to create an employement contract." This assertion undermines SU's credibility where its brief has no substance: it lacks a full discussion of the law and relies upon illogic and distinguishable cases. Texas case law plainly supports the submission of the 1988 letter to the jury for its determination as to whether the letter constituted a contract, and if so, whether it was breached and the amount of damages.